SUPREME COURT, U.S.

No. 74-5566

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

PEARL DARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 922(h), which, inter alia, makes it unlawful for a convicted felon to receive a firearm that has been transported in interstate commerce, does not encompass the intrastate purchase of a revolver from a retailer who had obtained the weapon from an out-of-state distributor, and that due process was violated by the district court's refusal to submit to the jury the question of petitioner's intent to violate the statute and by the government's failure to prove that petitioner knew he was prohibited from receiving the revolver.

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner, having previously been convicted in state court of housebreaking, a felony punishable by imprisonment for more than one year, was convicted of receiving a firearm which had been transported in interstate commerce, in violation of 18 U.S.C. 922(h).[1] Petitioner was sentenced to a term of three years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed, one judge dissenting (Pet. App. A; 504 F.2d 629).

The undisputed evidence showed that petitioner, a resident of Booneville, Kentucky, purchased a .32 caliber revolver from a retailer in Booneville, Kentucky (Tr. 37, 40-41, 77). The revolver had been manufactured in Springfield, Massachusetts, and was received by the retailer approximately three weeks earlier from a distributor in North Carolina. The sale to petitioner was the first retail sale of the weapon (Tr. 39-40, 42, 52). About 45 minutes after he had purchased the revolver, petitioner was arrested for driving while intoxicated. The police found the fully-loaded weapon on the floorboard of the car on the driver's side (Tr. 20-21, 78). Petitioner admitted that in January 1967, he had been convicted of housebreaking and had been sentenced to two years' imprisonment for that offense (Tr. 73-79).

The dealer who sold petitioner the revolver testified on cross-examination that he failed to present petitioner with the Federal Firearms Transaction Record, Form 4473, and failed

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[1] Title 18 U.S.C. 922(h) provides that "[i]t shall be unlawful for any person--

(1) who has been convicted in any Court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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to have petitioner answer the questions and sign the form, as required by 26 C.F.R. 178.124(a) and (c) (Tr. 45).[2] A question on the form asks whether the purchaser is a convicted felon and states that such a person may not purchase or possess a firearm. Petitioner testified that had the dealer asked him about the previous conviction, he would have acknowledged it (Tr. 67).

Petitioner testified, outside the presence of the jury, that in June 1969, he received from the Commonwealth of Kentucky a document (Pet. App. C 30) restoring his civil rights lost by reason of the state felony conviction (Tr. 64-65).[3] Petitioner testified that he believed the document permitted him to possess anything that any other citizen is allowed to possess, including a firearm (Tr. 66). The district court held the foregoing testimony to be inadmissible as evidence of petitioner's intent because 18 U.S.C. 922(h) does not require proof of intent (Tr. 68-69).

1. Petitioner contends that 18 U.S.C. 922(h) does not encompass the intrastate purchase of a new revolver from a retailer who had obtained the weapon from an out-of-state distributor less than a month before the sale. Contrary to petitioner's assertion, however, the reach of 18 U.S.C. 922(h) was not limited by this Court in United States v. Bass, 404 U.S. 336, 344, n. 10, to interstate transactions.[4] Whatever the outer boundaries of the statute's reach, petitioner's action in receiving a revolver which had been transported three weeks before in interstate commerce clearly violated the plain language of the statute, which prohibits convicted felons from receiving any firearm which "has been shipped or transported in interstate commerce" (emphasis supplied). Cf. United States v. Huddleston, 472 F.2d 592, 593 (C.A. 9), affirmed, 415 U.S. 814. Petitioner's narrow construction of the statute would restrict its application to instances where convicted felons had ordered firearms directly from an out-of-state distributor, and would exclude from coverage any and all face-to-face retail transactions (since face-to-face transactions could never be interstate). But surely Congress did not intend the broad language of Section 922(h) to have such narrow scope.[5]

2/ Petitioner purchased the revolver at about 5:15 on a Saturday night, making only a partial payment on the price; the dealer testified that he asked petitioner to return to the store on Monday, the next working day, to fill out the necessary papers, meaning the finance papers and the Firearms Transaction Form. However, the dealer admitted that he had not specifically mentioned the Firearms Transaction Form to petitioner (Tr. 47).

3/ Prior to trial and in the court of appeals petitioner contended that the restoration of rights document obviated the felony conviction and removed him from the class of persons subject to 18 U.S.C. 922(h). This contention was rejected by the district court and the court of appeals (Pet. App. A 20-23), and has not been pressed by petitioner.

4/ The government's concession in Tot v. United States, 319 U.S. 463, 466, referred to by the Court in Bass, that 15 U.S.C. 902(f) and (h) (the predecessor to 18 U.S.C. 922(h)) did not extend to the receipt in an intrastate transaction of firearms which had been transported in interstate commerce was based upon the government's interpretation of congressional intent in passing the 1938 statute. The present statute, however, was enacted in 1968. Case law regarding the reach of Congress' legislative jurisdiction under the commerce clause developed substantially between 1938 and 1968. Compare Hammer v. Dagenhart, 247 U.S. 251, 268-277 (1918), and Brooks v. United States, 267 U.S. 432, 439 (1925), with United States v. Darby, 312 U.S. 100, 117-123 (1941), and Wickard v. Filburn, 317 U.S. 111, 118-129 (1942). See also Perez v. United States, 402 U.S. 146; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253-258. Therefore, as the court recognized in Bass, "the reach of Title IV [Section 922(h)] is a question to be decided finally some other day" (404 U.S. at 343, n. 10).

5/ Had Congress intended 922(h) to cover only the direct receipt of a weapon still moving in interstate commerce, it would have used language such as that in Section 922(j) which prohibits, inter alia, the knowing receipt of a stolen firearm "which is moving in, which is a part of, or which constitutes" interstate commerce.

Nor is there now any question that Congress has the power to regulate such intrastate transactions having a bearing on interstate commerce. "The power of Congress *** extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of *** the exercise of the granted power of Congress to regulate interstate commerce." (United States v. Darby, 312 U.S. 100, 118).

Nor are the circuits in conflict on this issue, as petitioner maintains. United States v. Ruffin, 490 F.2d 557, 559-560 (C.A. 8), cited by petitioner and by the dissenting judge in the court of appeals (Pet. 8, Pet. App. A 26), is factually distinguishable from the instant case. In Ruffin, the evidence showed that a gun found in the defendant's possession in Missouri had been stolen seven months earlier in Illinois. There was no evidence that the defendant had received the weapon from anyone directly engaged in interstate commerce. Indeed, the defendant's receipt of the weapon could well have been the last of many solely intrastate transfers. In the instant case, however, it is undisputed that petitioner received the revolver directly from one engaged in the interstate business of firearm sales. Accordingly, petitioner's receipt occurred at the end of the weapon's interstate journey. In fact, in contrast to Ruffin, the sole reason that the firearm in the instant case was put into interstate commerce was for the purpose of effecting the retail sale at the end of its interstate journey.

In United States v. Craven, 478 F.2d 1329, 1336-1337 (C.A. 6), certiorari denied, 414 U.S. 866, on which petitioner also relies, it was not necessary that the court reach the instant question because the facts of the case permitted an inference that the firearm had been transported in interstate commerce by the defendant himself. Insofar as dictum in Craven may conflict with the Circuit's subsequent holding in the instant case, it is a matter for resolution by the Sixth Circuit. Wisniewski v. United States, 353 U.S. 901.

2. Petitioner also contends that due process was violated by the district court's refusal to submit to the jury the question of petitioner's intent to violate the statute and the government's failure to prove that petitioner knew he was prohibited from receiving the revolver. As petitioner concedes (Pet. 9), however, scienter is not an element of the offense defined by Section 922(h). Cf. United States v. Freed, 401 U.S. 601, 607-610; United States v. Jones, 481 F.2d 653, 654 (C.A. 2); United States v. Ruisi, 460 F.2d 153, 156-157 (C.A. 2), certiorari denied, 409 U.S. 914. Even if petitioner purchased the revolver under the mistaken belief that he was legally entitled to do so, therefore, the conviction would still be proper. Cf. United States v. Dotterweich, 320 U.S. 277, 284-285.

Lambert v. California, 355 U.S. 225, 229 and United States v. Renner, 496 F.2d 922, 926 (C.A. 6), cited by petitioner (Pet. 10-11), are inapposite. In Lambert this Court held that scienter was a necessary element of a city ordinance making it a crime for a convicted felon to remain in Los Angeles for more than five days without registering with the city. The act of remaining in a city was, however, one which is wholly passive and one which the average citizen would not have suspected to require registration. To the contrary, the purchase of a handgun is an act of volition which the average citizen would expect to entail federal, state, and local regulation. Moreover, the possible injustice of subjecting an unwitting violator to a penalty for purchasing such a weapon is clearly outweighed

by the danger of exposing citizens to weapons in the hands of convicted felons. Cf. United States v. Balint, 258 U.S. 250, 254.[6] By the same token Renner's requirement that the prosecution prove, as an element of the offense, that the defendant knew he previously had been indicted or convicted at the time he received the firearm does not conflict with the instant case. Here, petitioner knew at the time he purchased the firearm that he had been convicted of a crime punishable by a term of imprisonment exceeding one year. It was his responsibility, before he purchased a hand gun, to ascertain that the restoration of civil rights in the state pardon did not restore his right to purchase a firearm under federal law. Cf. United States v. Balint, supra, 258 U.S. at 254.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

6/ Nor does the failure of the dealer to have petitioner execute a Firearms Transaction Record excuse petitioner's violation of Section 922(h). Such a holding would mean that firearms dealers, by their negligence or otherwise, could confer the right to possess firearms upon those denied that right by Congress.

7/ Even if the decision of the Sixth Circuit in Renner were in conflict with the circuit's decision in the instant case, that is a matter for resolution by the Sixth Circuit.